

LO MAN HENG v. BURSA MALAYSIA SECURITIES BHD

HIGH COURT MALAYA, KUALA LUMPUR

HANIPAH FARIKULLAH J

[APPLICATION FOR JUDICIAL REVIEW NO: R2-25-3-01-2015]

16 JANUARY 2017

COMPANY LAW: *Directors – Duties – Failure to announce quarterly reports and annual audited accounts – Company failed to obtain management accounts of subsidiary for consolidation – Company imposed with public reprimand and fine – Whether shareholder of subsidiary could be held responsible for decision of subsidiary's board not to furnish management accounts to parent company – Companies Act 1965, s. 166A*

The applicant was the executive director and chief executive officer of NAKA, a public company listed on the official list of the respondent and the director of Tamabina, a subsidiary of NAKA. NAKA was found to have breached paras. 9.22(1) and 9.23(2) of the Main Market Listing Requirements ('MMLR') of the respondent for failing to announce its second, third and fourth quarterly reports ('QR') and annual audited accounts ('AAA') for the year 2013. The delay in submission of the second, third and fourth QR and the AAA was due to NAKA's failure to obtain management accounts of Tamabina for consolidation. The non-submission of the second QR led to the suspension in the trading of NAKA's securities pursuant to para. 9.28 of the MMLR and the trading of NAKA securities were suspended temporarily. The respondent (i) imposed NAKA with a public reprimand and a fine of RM2,000 per market day delay from the respective due date of submission of the second, third and fourth QR and the AAA and the subsequent outstanding financial statements until the applicant furnishes to NAKA the relevant accounts, information/documents of Tamabina to enable preparation and finalisation of the outstanding financial statements; and (ii) commenced enforcement action against the applicant, as NAKA's director, for breach of para. 16.13 of the MMLR for causing NAKA's failure to announce the second, third and fourth QR and the AAA within the stipulated time frames resulting in the breaches of paras. 9.22(1) and 9.23(2) of the MMLR. Hence, the present application for judicial review to quash the respondent's decision. According to the applicant, he had been removed as NAKA's executive director/chief executive director and no longer had control over the managements and affairs of NAKA. As such, the applicant further submitted, he was not in any position to ensure NAKA files the second QR when it became due. The issue that arose for the court's adjudication was whether the applicant, who was merely a shareholder of Tamabina, could be held responsible for the decision of Tamabina's Board not to furnish its management accounts to NAKA.

A **Held (dismissing application):**

- (1) Section 166A of the Companies Act 1965 ('the CA') imposes a duty on the directors of a company to ensure that the accounts of the company or the consolidated accounts of the holding company are made out in accordance with the approved accounting standards. Paragraph 14 of the Malaysian Financial Reporting Standards 134 ('MFRS') clearly prescribes that an interim financial report must be prepared on a consolidated basis if the entity's most recent annual financial statements were consolidated statements. As NAKA's annual audited accounts for the financial year ended on 31 December 2012, which was announced on 30 April 2013, was prepared on a consolidated basis, the QR must also be prepared on a consolidated basis to ensure that NAKA complies with para. 14 of the MFRS and its statutory duty under s. 166A of the CA. (paras 21, 22 & 23)
- (2) The applicant failed to show any evidence demonstrating the discharge of his obligations under the MMLR. He also failed to demonstrate that reasonable efforts were taken to procure the accounts/financial information/documents of Tamabina to enable NAKA to prepare and finalise the second QR which resulted in NAKA's inability to prepare and announce the other outstanding financial statements. The applicant was clearly aware that NAKA was required to submit the second QR on a consolidated basis in accordance with the MMLR and that Tamabina had, in the past, supplied its management accounts to NAKA. This meant that he was fully aware that his refusal to provide Tamabina's management accounts to NAKA would lead to NAKA's inability to finalise and issue/announce the second QR. Hence, the applicant blatantly disregarded his duty to ensure NAKA's compliance with the MMLR. (paras 17 & 19)
- (3) The decision of the respondent in imposing the fines for the continuing breach by NAKA caused by the applicant was reasonable and within its powers under the MMLR. Since it was the applicant who caused NAKA's breach, it was only reasonable to impose the fines until the breach is rectified or NAKA is put back in a position to finalise the second QR. (para 26)

Legislation referred to:

- H Companies Act 1965, ss. 166A(2), (3), 167

For the applicant - Teo Qing Qing; M/s Gideon Tan Razali Zaini

For the respondent - Nimalan Devaraja; M/s Skrine

Reported by Najib Tamby

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JUDGMENT

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Hanipah Farikullah J:**Introduction**

[1] The applicant filed an application for judicial review to quash the decision of the appeal committee of the respondent dated 8 October 2014 in affirming the respondent's listing committee decision that the applicant is in breach of para. 16.13 read together with paras. 9.22(1) and 9.23(2) of the Main Market Listing Requirements of the respondent.

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The Parties

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[2] NAKA is a public company listed on the official list of Bursa Securities.

[3] NAKA has a 51% shareholding in its subsidiary, Tamabina.

[4] Lo Man Heng ("the applicant") was at the material time:

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(i) an executive director of NAKA until 29 July 2013 and was also the chief executive officer of NAKA;

(ii) a director of Tamabina;

(iii) the husband of Lai Yun Fung who is also a director and a shareholder of Tamabina; and

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(iv) the brother of Lo Shwu Fen, who is a shareholder of Tamabina.

Background Facts

[5] It is not disputed that NAKA had been found to have breached paras. 9.22(1) and 9.23(2) of the main LR for failing to announce the following financial statements within the stipulated time frames:

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No.	Financial Statements	Due Date of Announcement
1.	Second Quarterly Report for the financial period ended 30.6.2013 ("2nd QR 2013")	31.8.2013
2.	Third Quarterly Report for the period ended 30.9.2013 ("3rd QR 2013")	30.11.2013
3.	Fourth Quarterly Report for the financial period ended 31.12.2013 ("4th QR 2013")	28.2.2014
4.	Annual Audited Accounts for the financial year ended 31.12.2013 ("AAA 2013")	30.4.2014

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[6] It is also not a disputed fact that the delay in submission of the second QR 2013, third QR 2013, fourth QR 2013 and AAA 2013 was essentially due to NAKA's failure to obtain the management accounts of Tamabina as at 30 June 2013 for consolidation. In this respect, it is pertinent to note that the management accounts of Tamabina is material towards the preparation

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A of the consolidated financial statements of NAKA Group and to ensure veracity of the second QR 2013, third QR 2013, fourth QR 2013 and AAA 2013.

[7] The affidavit evidence shows that:

B (a) NAKA had confirmed that Tamabina was NAKA's only operating subsidiary where the entire revenue of NAKA Group amounting to RM9,972,871 and RM1,736,0003 as at 31 December 2012 and 31 March 2013 respectively was contributed by Tamabina; and

C (b) The remaining subsidiaries of NAKA were inactive/dormant as noted from NAKA's annual report for the financial year ended 31 December 2013.

D [8] The impact of the breaches by NAKA is that the non-submission of the second QR 2013 had led to the suspension in the trading of NAKA's securities from 9 September 2013 pursuant to para. 9.28(5) of the main LR and the trading of NAKA's securities was suspended temporarily.

[9] As a result of its breaches, NAKA was imposed with a public reprimand by the respondent.

E [10] The respondent also commenced enforcement action against the applicant (who was a director of NAKA until 29 July 2013) for breach of para. 16.13(a) of the main LR for causing NAKA's failure to announce the second QR 2013, third QR 2013, fourth QR 2013 and AAA 2013 within the stipulated time frames resulting in the breaches of paras. 9.22 (1) and 9.23(2) of the main LR.

F **Bursa's Enforcement Proceedings**

G [11] The listing committee of the respondent issued a show cause letter dated 26 May 2014 ("the show cause letter") together with listing committee memo no. L15 of 2014 ("the listing committee memo") premised upon the allegation that the applicant had breached para. 16.13(a) of the Main Market Listing Requirement for causing the inability of NAKA to announce the second QR 2013, third QR 2013, fourth QR 2013 and AAA 2013 resulting in the breaches of paras. 9.22(1) and 9.23(2) of the Main Market Listing Requirements. The hearing date of the show cause letter was fixed on 5 June 2014. The management committee of the respondent recommended to the listing committee of the respondent the following penalties:

H (i) a public reprimand and fine of RM2,000 per market day delay from the respective due date of submission of the second QR 2013, third QR 2013, fourth QR 2013 and AAA 2013 and the subsequent outstanding financial statements until the applicant furnishes to NAKA the relevant accounts, information/documents of Tamabina to enable preparation and finalisation of the outstanding financial statements; and

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- (ii) if the applicant fails to furnish to NAKA the relevant accounts, information/documents of Tamabina to enable preparation and finalisation of the outstanding financial statements upon the expiry of seven market days from the date of notification of the penalty, the fine to be imposed on him be increased to RM3,000 per market day delay thereafter for each of the outstanding financial statements. A
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[12] The main complaint of the respondent's management committee against the applicant is that he had refused and/or failed to furnish the relevant management accounts of Tamabina to NAKA and/or frustrated NAKA's attempt to procure the relevant accounts of Tamabina while he was acting in his capacity as the director of Tamabina. C

[13] Upon receiving the show cause letter and listing committee memo, the applicant *vide* his solicitors' letter dated 4 June 2014 responded to the same and explained that he since being removed as NAKA's Executive Director/Chief Executive Director on 27 September 2013 no longer had control over the management and affairs of NAKA. As such, the applicant was not in any position to ensure NAKA files the second QR 2013 when it became due on 31 August 2013. D

Issue

[14] The issue that should be considered by this court is whether the applicant can be held responsible for the decision of Tamabina's Board not to furnish its management accounts to NAKA who is merely a shareholder of Tamabina. E

Decision

[15] The applicant submitted that the respondent had unreasonably and/or irrationally equated the applicant's inability to provide Tamabina's management accounts to NAKA as a disregard of his duty as the director of NAKA at the material time based on the following grounds: F

- (i) at all material times, the applicant was no longer a director of NAKA at the deadline to announce the second QR 2013 on 31 August 2014 as he was removed as the executive director of NAKA as at 29 July 2013. G
- (ii) the respondent assumes that the applicant is the only Director of Tamabina and can automatically provide the management account when clearly it is still subjected to the consent and/or approval of the Board of Directors of Tamabina who has no position in NAKA. NAKA does not have any board representation in Tamabina at the material time having removed the applicant as its corporate representative on 23 June 2013. H
- (iii) the respondent also failed to appreciate that the decision not to furnish the management accounts of Tamabina was made by the applicant in his capacity as the director of Tamabina. Tamabina is an independent and I

A separate legal entity and the applicant does not have any power to take assets of Tamabina and hand it over to NAKA without prior approval and consent of Tamabina's Board of Directors. The fact that Tamabina has given such management accounts in the past is irrelevant in light of the ongoing suits and disputes between parties. In any event, NAKA had board representation in Tamabina previously but not anymore.

B (iv) the respondent also failed to appreciate that the other directors and/or officers of NAKA did not take any action to request for management accounts after the removal of the applicant and the only measure taken by them is to secure an order dated 8 November 2013 against Tamabina.

C The Court of Appeal had on 22 July 2014 denied NAKA's prayer for Tamabina's management account.

[16] It is pertinent to note that the respondent's decision that the applicant had breached para. 16.13 of the main LR was due to the applicant's failure to discharge his duty as a director of NAKA at the material time before he was removed from the Board of NAKA on 29 July 2013 in ensuring compliance by NAKA of its obligation to prepare and ensure timely submission of its financial statements in accordance with the main LR.

D [17] I am satisfied that based on the facts of this present application that the applicant failed to show any evidence demonstrating the discharge of his obligations under the main LR and the respondent's appeal committee noted that the applicant had failed to demonstrate reasonable efforts taken to procure the accounts/financial information/documents of Tamabina to enable NAKA to prepare and finalise the second QR 2013 which had resulted in NAKA's inability to prepare and announce the other outstanding financial statements.

F [18] In fact, the evidence clearly shows that:

(i) the applicant was clearly aware that NAKA was required to submit the second QR 2013 on a consolidated basis in accordance with the main LR and that Tamabina had in the past supplied its management accounts to NAKA.

G (ii) the applicant refused to furnish the relevant accounts of Tamabina to NAKA and/or frustrated NAKA's attempts to procure the relevant accounts of Tamabina. In his email dated 17 June 2013, it was stated that neither the shareholders nor the directors of NAKA were entitled to access the financial information of Tamabina other than its audited accounts and he instructed the chief financial officer not to provide any further financial information and other information of Tamabina without instruction from the Board of Directors of Tamabina at the Board of Directors meeting on 21 June 2013 and he reiterated that NAKA was only entitled to Tamabina's audited accounts.

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[19] The evidence also shows that the applicant was clearly aware that NAKA was required to submit the second QR 2013 on a consolidated basis in accordance with the main LR and that Tamabina had in the past supplied its management accounts to NAKA. In this regard, he explained at the respondent's listing committee on 26 June 2014 that in view of attempts by the Board of NAKA to remove him as a director since/on 27 May 2013, the applicant had examined the law and procured legal advice whereupon he had refused to provide Tamabina's accounts. Therefore, the applicant was fully aware that his refusal to provide Tamabina's management accounts to NAKA would lead to NAKA's inability to finalise and issue/announce the second QR 2013 pursuant to the main LR. Hence, the applicant had blatantly disregarded his duty to ensure NAKA's compliance with the main LR.

[20] As the breach was committed by the applicant during his tenure as a director of NAKA, it is unreasonable for the applicant to justify that he was absolved from any liability for breaching the main LR of which he has undertaken to comply during his tenure as director of a listed company by virtue of him ceasing to be a director of the said listed company thereafter. To allow such justification would mean that directors who failed to discharge their obligations and contravened the main LR could escape responsibilities and liabilities by resigning and ceasing to be directors of the said listed companies and ultimately hinder the proper discharge of Bursa's statutory duty.

Paragraph 9.22 Of The Main LR Must Be Read Together With The Existing Applicable Laws And Accounting Standards

[21] Section 166A of the Companies Act 1965 imposes a statutory duty on the directors of a company to ensure that the accounts of the company or the consolidated accounts of the holding company are made out in accordance with the approved accounting standards. Subsection (2) and (3) in particular provide that:

(2) The approved accounting standards shall apply to the accounts of a company or the consolidated accounts of a holding company if at the time when the accounts or consolidated accounts are made out, the approved accounting standards;

(a) Apply in relation to the financial year of the company or the holding company to which the accounts or consolidated accounts relate;

(b) Are relevant to those accounts or consolidated accounts; and

(3) Without prejudice to the generality of the provisions of this Division, the directors of a company shall ensure that the accounts of the company and, if the company is a holding company for which consolidated accounts are required, the consolidated accounts of the company, laid before the company at its annual general meeting are made out in accordance with the applicable approved accounting standards.

A [22] Paragraph 14 of the Malaysian Financial Reporting Standards 134 (“MFRS 134”) clearly prescribes that an interim financial report must be prepared on a consolidated basis if the entity’s most recent annual financial statements were consolidated statements. As NAKA’s annual audited accounts for the financial year ended on 31 December 2012, which was
B announce on 30 April 2013, was prepared on a consolidated basis, consequently the quarterly reports must also be prepared on a consolidated basis to ensure that NAKA complies with para. 14 of MFRS 134 and its statutory duty under s. 166A of the Companies Act 1965.

C [23] Under s. 167 of the Companies Act 1965, financial statements must reflect the true and fair view of the results of the business and the state of affairs of the company and in this regard, para. 9.16(1) of the main LR which required that all listed issuers must ensure that their announcements are factual, clear, unambiguous, accurate, succinct and contained sufficient information to enable investors to make informed investment decisions. In
D addition, since NAKA was required to announce the second QR 2013 after the end of the financial period, it must be based on actual results and/or facts and cannot be based on projections which are only applicable for the future where the figures were not available.

E **The Penalties Imposed By The LC/AC On The Applicant Were Fair And Reasonable In Light Of The Gravity And Materiality Of The Offences**

F [24] The imposition of the fine on the applicant is within the respondent’s powers and jurisdiction under para. 16.19(1)(b)(iv) of the main LR. The fine imposed on the applicant is in fact a total of four separate fines for four breaches (each up to a maximum of RM500,000) as the applicant had
breached para. 16.13(a) of the main LR arising from NAKA’s failure to announce the four financial statements in accordance with paras. 9.22(1) and 9.23(2) of the main LR.

G [25] The respondent’s appeal committee had imposed on the applicant the monetary penalty amounting to RM2,000 per market day delay (from the respective due dates of the outstanding financial statements) up to a maximum of RM500,000 per breach/outstanding financial statement until the relevant information/documents of Tamabina is furnished to NAKA towards the preparations of the second QR 2013 in view of his wilful and unreasonable conduct as a director of NAKA (prior to his removal on
H 29 July 2013). The fine imposed was premised on amongst others aggravating factors including his involvement and conduct in Tamabina and in frustrating NAKA’s efforts to procure the relevant information which resulted in NAKA’s inability to finalise and issue the consolidated outstanding financial statements to date. Further, his wilful conduct was/
I appeared to be in retaliation against NAKA for his removal as a director.

[26] Premised on the above, the decision by the respondent's listing committee and the respondent's appeal committee including the imposition of the fines for the continuing breach by NAKA caused by the applicant was reasonable and within its powers under the main LR particularly in the light of the facts and circumstances which showed that it was the applicant who caused NAKA's breach at the outset and hence, it was only reasonable to impose the fines which continuing until the breach is rectified/NAKA is put back in a position to finalise the second QR 2013.

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Conclusion

[27] Based on the above reasons, in my view, there is no evidence to show that:

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- (i) the respondent had exercised powers that it did not have;
- (ii) the respondent had exercised its powers in an unreasonable manner; and
- (iii) the respondent had failed to observe the procedural rules set out in the main LR.

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[28] I agreed with the respondent's contention that the powers of Bursa Securities are intended to be exercised to protect the investor public's interest and to ensure the investor public's confidence in the capital market. It is therefore essential that the respondent, as the front line regulator of the capital market be at liberty to exercise its powers to monitor compliance of the main LR and take the necessary action when there is a breach of the main LR. Any interference of these powers and functions would have far-reaching and profound consequences as to the viability and the maintenance of a credible and transparent capital market in which the investor public should have the confidence to invest.

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[29] Accordingly, the applicant's appeal is dismissed with costs of RM10,000.

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